IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5740

ROGER GUPTA and KANTA GUPTA,
Petitioners,

v.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.
and
NEW YORK STOCK EXCHANGE, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR NEW YORK STOCK EXCHANGE, INC.

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REGULATIONS

Securities & Exchange Commission Rule 10b-5, 13 Federal Register 8177:

Employment of Manipulative and Deceptive Devices

Reg. §240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

QUESTIONS PRESENTED

1. Does the appointment of arbitrators involve the purchase or sale of securities?

2. Are interest and costs to be included in determining the $10,000 required for district court jurisdiction?

3. Is a party against whom no relief is sought a proper defendant?

STATEMENT OF THE CASE

Petitioners Roger and Kanta Gupta ("Guptas") had certain claims of late deliveries against the stock brokerage firm of Goodbody & Company concerning their dealings in securities. Goodbody & Company was taken over by respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and the Guptas agreed to arbitrate these claims against Merrill Lynch under the arbitration rules and procedures of respondent New York Stock Exchange, Inc. ("Stock Exchange"). Roger Gupta's claim in the arbitration proceeding was $5,954.32 and Kanta Gupta's claim in the arbitration proceeding was $1,886.52.

The Stock Exchange appointed arbitrators and, on November 2, 1972, an arbitration proceeding was held in Pittsburgh. On that date the arbitrators found in favor of Merrill Lynch, with the exception of one claim in the amount of $8.31.

On December 18, 1972, the Guptas brought suit pro se against Merrill Lynch and the Stock Exchange in the District Court for the Western District of Pennsylvania. They sought, in Count I of the amended com-

plaint, to vacate the arbitration award pursuant to 9 U.S.C. §10, and, in Count II of the amended complaint, "compensatory," "exemplary" and "punitive" damages pursuant to the Securities Exchange Act of 1934.

Despite the litany of malfeasance alleged in their amended complaint, the essence of the Guptas' claims is that the arbitrators were prejudiced against them and conducted themselves improperly. More particularly, the Guptas complain that they were not informed, prior to the arbitration hearing, of the existence of an agreement between the Stock Exchange and Merrill Lynch by which the Stock Exchange promised to indemnify Merrill Lynch for losses incurred in taking over Goodbody & Company accounts. Because two of the five arbitrators were partners in firms which were members of the Stock Exchange and stood to be assessed in connection with this agreement to indemnify (though less than $20), the Guptas allege that the arbitration panel was biased and prejudiced against them. The Guptas make this assertion despite the fact that they put in evidence at the arbitration hearing a newspaper article which fully disclosed the existence and terms of the agreement to indemnify.

On February 26, 1973 the Stock Exchange filed a motion to dismiss both counts of the amended complaint for failure to state a claim upon which relief could be granted. The Stock Exchange argued that the grounds alleged in the amended complaint were patently insufficient upon which to vacate the arbitration award; that the Stock Exchange was not a necessary nor a proper party to Count I, an action to set aside the arbitration award; that as to Count II, the alleged "scheme to defraud" was unrelated to the purchase or

sale of any security and therefore not actionable under the Securities Exchange Act of 1934; and, that the Stock Exchange is immune from any action based on misconduct allegedly committed in connection with an arbitration.

By Memorandum Opinion, the District Court entered an Order on May 17, 1973 dismissing Count II of the amended complaint because the allegations thereof did not concern the purchase or sale of securities under the Securities Exchange Act of 1934:

> "There can be as a matter of law no violation of the Securities and Exchange Act of 1934 flowing from the conduct of arbitration proceedings." (2A)

The motion to dismiss Count I was denied by the District Court.

Following the deposition of Roger Gupta, taken on August 8, 1973, wherein he testified that in Count I he sought no relief against the Stock Exchange, the Stock Exchange, on August 28, 1973, filed a motion for judgment on the pleadings. It argued to the District Court that in attempting to have the arbitration award set aside in Count I of the amended complaint, the Guptas were not seeking any relief against the Stock Exchange so that the Stock Exchange was improperly joined as a party to Count I of the amended complaint pursuant to Rule 20(a) of the Federal Rules of Civil Procedure. On September 21, 1973, the District Court denied this motion of the Stock Exchange.

On October 24, 1973, Merrill Lynch filed a motion to dismiss for lack of jurisdiction. The Stock Exchange joined in this motion. Merrill Lynch and the Stock Exchange argued that, from the face of Count I of the amended complaint, the then remaining count, the

amount in controversy did not exceed $10,000, exclusive of interest and costs, and that therefore there was no basis for the District Court's jurisdiction pursuant to 28 U.S.C. §1332(a). On the face of Count I of the amended complaint, Roger Gupta's claim in the arbitration proceeding was $5,954.32 and Kanta Gupta's claim in the arbitration proceeding was $1,886.52.

On November 5, 1973, the District Court entered an order granting the motions of Merrill Lynch and the Stock Exchange on the basis that the amount in controversy, from the face of the remaining count of the amended complaint, was below $10,000, exclusive of interest and costs, and that, therefore, the District Court had no jurisdiction to proceed.

The Court of Appeals for the Third Circuit, after reading the briefs on appeal, decided that oral argument was unnecessary, and affirmed. A motion for rehearing was unanimously denied by the entire court.

ARGUMENT.

I. Summary Judgment Is Proper Even Where Fraud Is Alleged When—Even If There Were Fraud—The Court Does Not Have Jurisdiction.

The Guptas argue in their Point I that the granting of summary judgment is in conflict with decisions of this Court. They contend that this Court has held that an allegation of fraud raises a question of fact which cannot be decided summarily. But they miss the point, which is that for the purpose of summary judgment the issue is not whether or not there was a fraud. The issue is whether, just because the Stock Exchange is a stock exchange, every wrongful thing it is alleged to have done constitutes a violation of the Securities Exchange Act of 1934. The Guptas are unable to point to any statutory provision which subjects to federal regulation the manner in which registered stock exchanges administer arbitration proceedings involving member firms. None of the cases they cite hold or even suggest that alleged improprieties in particular arbitration proceedings constitute violations of federal law.

According to the allegations of the amended complaint, the stock brokerage firm of Goodbody & Company was late in delivering to the Guptas securities owned by them, so the Guptas began arbitration proceedings against Merrill Lynch which had assumed certain Goodbody liabilities. The Stock Exchange appointed arbitrators and, say the Guptas, did so fraudulently, so the arbitrators decided against the Guptas. Now the Guptas invoke the jurisdiction of the federal district court on the theory that in so appointing the arbitrators the Stock Exchange violated Rule 10b-5 of the Securities and Exchange Commission issued under the Securities Exchange Act of 1934, and they rely on

this Act to establish jurisdiction. The District Court, on page 2 of its Memorandum Opinion, held in dismissing Count II of the amended complaint:

> "There can be as a matter of law no violation of the Securities Exchange Act of 1934 flowing from the conduct of arbitration proceedings." (2A)

Although Rule 10b-5, (*supra*, p. 1) broadly prohibits "manipulative and deceptive devices . . . in connection with the purchase or sale of any security," it does not purport to reach any and all claims of fraud involving securities:

> "Section 10(b) . . . was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities . . . and . . . Rule X-10b-5 extended protection only to the defrauded purchaser or seller." *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (2d Cir. 1951), cert. denied, 343 U.S. 956 (1952).

No such "purchase or sale" has been alleged and the alleged "scheme to defraud" in connection with the arbitration proceeding, involving the Guptas' claims against Goodbody & Company, is clearly unrelated to "the purchase or sale of any security." *Miller v. Steinbach*, 268 F. Supp. 255, 279 (S.D.N.Y. 1967).

The appointment of an arbitrator, even if fraudulent, is not "in connection with the purchase or sale of any security." Neither the Stock Exchange nor the arbitrators purchased or sold any securities, and the Guptas had no dealings with them involving the purchase or sale of any security. Even if a judge were to decide fraudulently who was at fault in an automobile accident, that would not mean that the judge was involved in the accident.

The Guptas argue (p. 23) that Goodbody & Company violated various provisions of the Securities Exchange Act. But jurisdiction under that Act against the Stock Exchange must be founded on what it did in the selection of arbitrators, and not on what Goodbody & Company did to provoke the controversy.

We know of no decision of this Court or of any court holding that the selection of arbitrators by a stock exchange involves the purchase or sale of securities. Nor are arbitrators expected to "sever all their ties with the business world": *Commonwealth Coatings Co. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968), particularly where, as here, "the relationship is trivial": concurring opinion, 393 U.S. 150. And "disgruntled losers cannot first raise their objections after an award has been made": *Garfield v. Wiest*, 432 F.2d 849, 853 (2d Cir. 1970), cert. den. 401 U.S. 940 (1971). Accordingly, the criteria of Supreme Court Rule 19 have not been met.

II. Interest and Costs Are Not To Be Included in Determining the $10,000 Required for District Court Jurisdiction.

The Guptas' claim against Goodbody was for damages of $7,840.78. To this they seek to add $2,822 as interest and $1,000 as costs to reach the jurisdictional amount of $10,000, and complain that "The District Court erred . . . by excluding interest and cost out of the total amount in controversy . . ." (pp. 24-25). But 28 U.S.C. §1332(a) grants jurisdiction "where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs . . ." Hence the District Court clearly had no jurisdiction over Count I of the amended complaint.

The Guptas cite *Brainin v. Melikan*, 396 F.2d 153 (3rd Cir. 1968), in support of the proposition that interest may be included in determining the amount in controversy. (Brief, p. 25). In that case, the interest which was considered in addition to the face amount of the note sued upon, was interest which had accrued on the note between the execution of the note and its maturity; the interest, in other words, was an "integral part of the total obligation demanded from defendant by plaintiff." *Id.* at 155. The interest which the Guptas seek to include, on the other hand, is interest on the amount of their claims which arose "solely by virtue of a delay in payment." It was precisely this kind of interest which the *Brainin* court held may *not* be considered.

Nor can jurisdiction for Count I be established by adding the fantastic sums claimed in Count II of the amended complaint, since that Count rests on the specious claim that when the Stock Exchange selected arbitrators it was engaging in the purchase or sale of securities. Jurisdiction cannot be gained by a claim so fictitious; ". . . if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount, the case will be dismissed for want of jurisdiction." *Davis v. Shultz*, 453 F.2d 497, 501 (3rd Cir. 1971). Further, the Arbitration Act itself, 9 U.S.C. §1, does not independently confer jurisdiction. *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 384 (2nd Cir. 1961) cert. den. 368 U.S. 817 (1961).

Finally, to the extent that the Guptas relied upon state tort law to argue for vacation of the arbitrators' award, the District Court had discretion to refuse to

rely on pendant jurisdiction. This Court has declared, "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

III. A Party Against Whom No Relief Is Sought Is Not a Proper Defendant.

Rule 20(a) of the Federal Rules of Civil Procedure provides that "all persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief." When no relief is sought against a party, that party is not properly joined.

In Count I of the amended complaint the Guptas seek only to have the arbitration award set aside. They seek no relief against the Stock Exchange and, accordingly, the Stock Exchange was not a proper party to Count I: "A party to an action is one who seeks relief, or against whom relief is sought." *Chessman v. Teets*, 239 F.2d 205, 214 (9th Cir. 1956), reversed on other grounds 354 U.S. 156 (1957).

In *Carroll v. Brotherhood of Railroad Trainmen*, 417 F.2d 1025, 1027 (1st Cir. 1969) cert. denied, 397 U.S. 1039 (1970), the Court ruled:

> "To justify permissive joinder, plaintiff must demonstrate that he has some right to relief against the Railroad growing out of the events in question. Fed. R. Civ. P. Rule 20(a). While it is well established that federal courts have ancillary jurisdiction over the employer in an action for the union's hostile discrimination, it is still necessary to state a claim

on which relief may be granted against the employer."

The Stock Exchange acted only in the capacity of a clerk of court in the arbitration proceedings. It was not a party to the proceeding or award. If a clerk of court assigns a case to a judge who acts and decides improperly, the clerk is not a proper nor a necessary party to an appeal of that action. The Guptas can clearly get the relief they request, vacation of the arbitration award, without needing the Stock Exchange as a party. Simply stated, if the Guptas would carry the burden of proof at trial necessary to have the arbitration award set aside, what order or judgment could the District Court enter against the Stock Exchange?

Clearly, the Stock Exchange is neither a necessary nor a proper party to this action to set aside the arbitration award. *Garfield & Co. v. Wiest,* 432 F.2d 849 (2nd Cir. 1970), cert. denied, 401 U.S. 940 (1970); *Sobel v. Hertz, Warner & Co.,* 469 F.2d 1211 (2nd Cir. 1972). The Arbitration Act contemplates litigation of the validity of arbitration awards solely between the "part[ies] to the arbitration" [9 U.S.C. §§9 and 10], and full relief on Count I of the amended complaint can be obtained whether or not the Stock Exchange is a party to that count.

Indeed, Roger Gupta admitted, in his deposition taken on August 8, 1973, at pages 58-59, that he sought no relief against the Stock Exchange in Count I and that the Stock Exchange was not a necessary party to an action to set aside the arbitration award:

"Q. Mr. Gupta, do I understand you to say just now that you have no claim for damages under Count No. I?

A. No.

Q. Well, now, 'no,' do you mean 'No,' you have no claim, or—I don't understand you correctly.

A. The claim is only to the extent of having the award set aside and going back either to the court of law or getting the claim settled through Merrill Lynch.

Q. So all you are seeking now is to vacate the award?

A. Yes.

Q. And then—

A. Let me qualify that: Since the second part of it has been dismissed by the judge, so the first cause is only that much—to have the award set aside.

Q. Then what remedy are you seeking against the New York Stock Exchange?

A. For this cause, none.

Q. Then why don't you dismiss against the New York Stock Exchange?

A. I don't care whether New York Stock Exchange comes to the court or doesn't come to the court, it doesn't bother me at all a bit."

In any event, therefore, so far as the Stock Exchange is concerned, Count I is moot.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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